Supreme Court, U.S.
FILED

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No. 97-

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1997

GERALD GEE,

Petitioner,

v.

FREDERICK HUMPHRIES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments protect the speech of a public university professor in his classroom and limit the university's ability to discipline him for such speech?

2. Does the Fourteenth Amendment require a plaintiff to exhaust all possible state judicial remedies before he can bring a claim under 42 U.S.C. § 1983 that he was deprived of property and liberty without due process?

PARTIES TO THE PROCEEDING

The parties to the litigation are:

Plaintiff (Petitioner):

Gerald Gee

Defendants (Respondents):

Frederick Humphries
Bishop Holifield
Carrie Gavin
Nellie Woodruff
Robert Rollins
Richard Hogg
James Heckin, Jr., Elizabeth Lindsay, Audrea Anderson, Julian Bennett, Jr., Frank Brogan, Paul Cejas, Charlton Daniel, Jr., Perla Hantman, Gwendolyn McLin, Jon Moyle, Dennis Ross, Steven Uhlfedler, Welcom Watson, and Cornelia Sha'ron James, in their official capacities as members of the Board of Regents of the State of Florida

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OPINIONS BELOW

The summary affirmance of the United States Court of Appeals for the Eleventh Circuit, filed on April 3, 1998, is reproduced in Appendix ("App.") A.

The December 3, 1996 opinion of the United States District Court for the Northern District of Florida granting defendants summary judgment on plaintiff Gee's claims under 42 U.S.C. § 1983 for violation of his free speech rights under the First and Fourteenth Amendments and for deprivation of property and liberty without due process in violation of the Fourteenth Amendment is reproduced in Appendix B. The final judgment in the district court is reproduced in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 3, 1998. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT LAWS

United States Constitution, amendment I
United States Constitution, amendment XIV
42 U.S.C. § 1983
Fla. Adm. Code § 6C3-10.125

These provisions are set forth in Appendix D.

STATEMENT OF THE CASE

This case involves a professor who was suspended for two weeks for the content and ideas expressed in an oral communication to his class. This appeal challenges a judgment that affirmed an order granting defendants sum-

mary judgment; accordingly, the facts must be construed in the light most favorable to the plaintiff, Gerald Gee.

Plaintiff Gerald Gee was a non-tenured Assistant Professor at the School of Journalism, Media, and Graphic Arts at Florida A&M University ("FAMU" or the "University"), a historically black institution. As a non-tenured professor, he was employed at FAMU pursuant to a series of nine-month contracts each academic year. R.102, p. 2; R.193, ¶ 6.[1] The case revolves around events that took place in his Public Relations Case Studies (PUR 4001) class on Monday, September 20, 1993. The class normally met on Mondays from 5:45 p.m. to 8:15 p.m. R.83, ¶ 17 & R.87, p. 3.

When Gee entered the classroom that evening, an open conversation among the fourteen African-American students in attendance was taking place concerning whether the University provided sufficient opportunities for Public Relations majors to acquire practical experience. Some students complained that FAMU was not providing Public Relations majors with opportunities for practical experience in the same way that they provided a student-run newspaper for journalism majors and a student-run

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[1] Record references will be in the form R.#, p. # or R.#, ¶ #, where the record refers to the number ascribed to a particular document on the docket of the clerk of the District Court. "Att." refers to an attachment to the referenced document in the record.

Gee had taught at FAMU since 1977. R.193 ¶ 5; R.118-Att., Ex. 1, ¶ 2. In 1983, he was the first educator to receive the Florida Public Relations Association's "President's Award" for "outstanding contributions to the advancement of professionalism in public relations." He is also an ordained Elder in the United Methodist Church. R.6, ¶ 2 & Ex. 1, ¶¶ 4, 5.

radio station for communications majors. R.169-Att., Ex. A, pp. 107-12. After listening for a short while, Gee began to participate, reminding his students that public relations people needed to be "versatile," that they could volunteer on other "outlets" at the University, and that other Public Relations majors had done so. R.102, p. 2 & R.100, ¶ 10; R.6, ¶¶ 2, 4 & Ex. 1 ¶ 16. He also volunteered to assist them in creating a student-run PR firm. App. I4; R.169-Att., Ex. A, pp. 116-18.

As defendants' own investigation later recognized (*see* App. J4), "[i]t was common for the students [in Gee's class] to discuss topics that concerned them, whether those topics were a part of the lecture or not." The issue of opportunities for practical experience in public relations available at FAMU for Public Relations majors was also a matter that was important to Gee and FAMU, one which the University president, Frederick Humphries, had emphasized. R.101-Att., Humphries Dep. 140.

When it became time to start the class, Gee expressed his own opinion. He said the following:

> Now I'm going to say something which may upset some of you, because I'm going to use a term that I, myself, consider offensive. What I'm about to say is *not* directed at any of you, or all of you as a class; it's just something I want you to think about . . .
>
> What I want you to be aware of is that in this day and age, a person can't sit around waiting for someone to give them something. Anyone who doesn't take advantage of the opportunities that are there, or who

> doesn't make opportunities for themselves may be guilty of having what some would call a "nigger mentality" -- the sort of thinking that can keep us all on the back of the bus forever. App. B3.

Gee wanted to impress upon his entire class the "importance of using individual initiative in creating opportunities for practical public relations work" and hoped to convey how important it was for them "to consider their own responsibility for creating such opportunities." R.6, ¶ 4. *See generally* App. I.

A number of students in the class understood Gee's message of self-reliance, and nodded in agreement. App. I9; R.191-Att., Gee Dep. 176-77. Others, as described in more detail below, did not.

A. Use Of The Word "Nigger" On FAMU's Campus

During the years in which Gee taught at FAMU, other professors have used the word "nigger" in various contexts. None of them has been punished. *See* R.191-Att., Miller Aff. ¶ 3 ("I have specifically heard African American Professors use the term 'nigger' in reference to how some white people may perceive African Americans"); R.20, pp. 16-20 (describing specific instance in which professor told his class that they were acting like "niggers"); R.191-Att., Bertolaet Dep. 42-45 (describing various situations in which faculty have used the word "nigger"); Kierstead Dep. 37-40 ("nigger" used by faculty and students alike); Grow Dep. 90-91 & Ex. J thereto, p. 3 (used by faculty); Tucker Dep. 32-33, 46. Books with the word "nigger" in the title, and that used that word

in their text, are part of the curriculum at FAMU. *E.g.*, R.191, Ex. G (reading list for Contemporary Black Theater which includes the play "The Electronic Nigger" by Ed Bullins).

Indeed, defendants below conceded that "[i]t is clear that the word 'nigger,' when used in the proper pedagogical context, is permitted at [FAMU]." R.116, p. 7; R.101-Att., Humphries Dep. 36. Thus, defendants have asserted, it was *not* Gee's use of the word "nigger" that triggered the students' complaints and Gee's eventual punishment:

> The students that complained about [Gee's] remarks of September 20, 1993 did not complain because he used a particular word, in the context of a class lesson, that they found inappropriate. The students complained about the *point*, i.e. the message of [Gee's] speech . . . Thus, the students were not complaining about [Gee's] use of the N-word, they were complaining about the context in which he utilized the word.

R.116, p. 16 (emphasis in original).

B. The Complaints And The University's Flawed Investigation And Punishment Of Gee

Six of the fourteen students in the class that evening of September 20, 1993 subsequently signed a letter, dated September 22, 1993, complaining about Gee's speech, and sent it to various University officials, including President Humphries. (The letter was also signed by a seventh student who was not in Gee's class.) R.100-Att., Ex. A. Shortly thereafter, Alvina Miller, one of the

students in Gee's class on September 20, 1993, circulated a petition supporting Gee and the "choice of his discussion topic." It was signed by more than 50 students. R.100-Att., Ex. B; R.20, pp. 30-31.

After President Humphries concluded that Gee had engaged in "racial harassment," and notified Gee that his contract would not be renewed, Gee filed a grievance pursuant to the Collective Bargaining Agreement ("CBA") between the United Faculty of Florida and the Board of Regents of the State of Florida ("Board"). Eventually, at Step 2 of the grievance process, a representative of the Office of Human Resources of the Board concluded that President Humphries had denied Gee due process because he had failed to follow Section 6C3-10.125(5), F.A.C. (*see* App. D10-D13), which provides procedures for the resolution of claims of discrimination and harassment. R.100-Att., Ex. E. Accordingly, the non-renewal was reversed, and the matter remanded for proceedings consistent with that rule.

Those procedures required that complaints alleging harassment be filed with the "EEO/EEA Officer" in the Equal Opportunity Programs Office at FAMU, *viz.*, Carrie Gavin. On August 9, 1994, Gavin wrote to the seven students who had signed the September 22, 1993 letter, and asked them to press formal charges of racial discrimination in violation of Section 6C3-10.125, F.A.C. against Gee. To facilitate such complaints, Gavin's letter included the official forms on which formal complaints of discrimination and harassment are made. R.100-Att., Ex. G.

Four students did file complaints of racial discrimination with Gavin's office. Although the complainants each had slightly different versions of what transpired on

September 20, 1993, and at least one spoke at length of her distress at hearing Professor Gee's speech, their complaints confirmed the basic context in which Gee spoke, and the substance of what he said. App. E2 ("Gee then informed the class that he was about to say something that may offend some of us"), E6 ("Gee warned the class he would make a statement many might consider offensive . . . Many students told Gee that although his point was understood, his statement was not appreciated"), and E7 (speech occurred during a class discussion in which Gee emphasized that "students needed to go out and find opportunities to enhance their learning experience").

On August 23, 1994, Gavin wrote to Gee to give him "formal notification" of the complaints having been filed with her. App. F. Gavin's August 23 letter did not identify which of the separate paragraphs in the "definitions" of discrimination set forth in Section 6C3-10.-125(2), F.A.C., (App. D3-D6), were at issue. So, too, Gavin did not provide Gee with the complaints themselves, the names of the individuals who had made them, or the number of students who had filed complaints. R.110-Gee St. ¶ 3. When Gee specifically asked for that information (App. G), Gavin falsely asserted that "the University" already had provided it. App. H; R.20, pp. 45-46. Nonetheless, at Gavin's request, Gee submitted a written statement on September 2, 1994. App. I.

Gavin submitted her report to President Humphries along with a cover letter dated October 10, 1994. App. J. The last sentence in Gavin's findings concluded that Gee had violated Section 6C3-10.125. Although her conclusion does not identify under which of the various paragraphs "defining" discrimination and harassment Gee's speech had fallen, App. D3-D6, it does refer to the re-

quirements for a "racially hostile environment." App. J7.

To the extent there were factual differences among the accounts, Gavin "could not take either side" (R.20, p. 48) and did not resolve any disparities between Gee's version and the complainants' version as to what had transpired in class on September 20, 1993, or anything related to Gee's motive or purpose. She believed that such disputes were "minor" and "weren't important," that such disputes "didn't affect the outcome," and that Gee's own version of what took place supported her findings of racial harassment. Rather, Gavin took only what was "common" among the versions. R.20, pp. 47-48; R.101-Att., Gavin Dep. 168-69, 214-16. Thus, Gavin concluded only that Gee had used the word "nigger," and that his use "hindered the educational opportunities" of some of his students. R.20, pp. 40, 48.

Gavin's findings supporting her conclusion were (1) the reactions of the students in class, (2) the reactions of students outside of the class, and the "divisiveness" caused by Gee's remarks as reflected by, *inter alia*, the petition supporting Gee, and (3) the reactions of the faculty, and the divisiveness caused by Gee's remarks as reflected by, *inter alia*, "faculty members writing articles and stating their different opinions in editorials." *See generally* R.101-Att., Gavin Dep. 217-20.

Gavin recommended that Gee be suspended for two weeks without pay. App. J7.

Under Section 6C3-10.125(5)(e), F.A.C., (App. D13-D14) Gavin's report and recommendation was given to President Humphries. President Humphries relied exclusively on Gavin's report in determining Gee's punish-

ment. Although various individuals had previously investigated the matter, President Humphries did not review any prior report. After his initial decision had been overturned, he wanted a "fresh person" to take a "fresh look" at the case. He did not "contrast [Gavin's report] with . . . what had transpired before," and he "went along" with Gavin's recommendation. R.101-Att., Humphries Dep. 170-75; R.133-Ex. A, pp. 177-78, 191-94.

Thus, like Gavin, President Humphries concluded that Gee had engaged in racial harassment and that a two week suspension without pay was an appropriate punishment. R.101-Att., Humphries Dep. 170-75. President Humphries's decision was embodied in his October 24, 1994 letter to Gee, which stated that (1) Gee would be suspended for two weeks without pay, (2) a copy of Gavin's investigative report would be placed in Gee's "evaluation file," and (3) appropriate action would be taken if "future conduct of this nature occurs again." App. K.

The October 24 letter also stated that Gee had ten (10) working days from his receipt of his letter to appeal that decision by appearing before the University Personnel Committee ("UPC"). App. K2. It did not mention any other options to Gee and no one at the University suggested any other options to him. R.110-Gee St. ¶ 4.

Gee timely appealed President Humphries's decision in a letter dated November 9, 1994. App. L. An Investigatory Interview with the UPC was scheduled for November 22, 1994. Prior to that time, Holifield, FAMU's General Counsel, wrote Gee's representative that the hearing would be "informal and not in the nature of an evidentiary hearing," and that "cross-examination and

similar legal procedure" were prohibited. R.118-Att., Ex. 33. In fact, Gee was precluded from bringing any witnesses to the UPC hearing to speak on his behalf. R.191-Att., Gee Dep. 313-17.

President Humphries wrote a letter to Gee on December 2, 1994 stating that the UPC had upheld the discipline he had imposed. App. M. The earlier decision was upheld because Gee had presented no "new evidence" at the non-evidentiary hearing before the UPC. R.110-Rosman St. Ex. D, pp. 212-16.

Section 6C3-10.125(5)(f), F.A.C., (App. D12), states that a party "may appeal to the President for a review of his original decision," and President Humphries's December 2 letter stated that Gee could "appeal this decision with [President Humphries] within twenty (20) working days." App. M1-M2. No other form of appeal was mentioned. On January 9, 1995, Gee timely appealed to President Humphries. App. N.

President Humphries rejected Gee's last appeal in a letter dated January 11, 1995, two days later. App. O. Mailed one day after that, the letter informed Gee that his two week suspension without pay would begin on January 18, 1995 and end at the close of business on January 31, 1995. It mentioned no additional avenues of appeal. In fact, Gee was suspended, and the suspension deprived Gee of salary that he otherwise would have received under the contract for his teaching services.

C. The Proceedings Below

Gee commenced this action in federal court on January 23, 1995, five days after the beginning of his

suspension. R.2. After Gee moved for a temporary restraining order and a preliminary injunction, a hearing was held on January 25, 1995. R.20. The Court below denied Gee's application for a temporary restraining order at that time, but scheduled a further hearing for January 27, 1995 on the motion for a preliminary injunction. Prior to that second hearing, defendants agreed to end Gee's suspension early and Gee agreed to withdraw the motion for a preliminary injunction. App. B3-B4 n.1.

The amended complaint alleged that defendants violated Gee's rights of free speech (Count I), equal protection (Count II), and due process (Count III). In February 1996, Gee moved for partial summary judgment against President Humphries, in his official capacity only, on the First Amendment claim. Thereafter, defendants made various motions for summary judgment, including one for summary judgment on all counts.

The District Court decided these motions in an opinion and order dated December 3, 1996. App. B. Applying the "public concern" test of *Connick v. Myers*, 461 U.S. 138 (1983), the District Court concluded that "it is plain that [Gee's comment] was a racially derogatory remark" (App. B6), and that it therefore could not have been on a matter of "public concern" as a matter of law and was not protected by the First Amendment.[2]

The District Court also rejected several other of

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[2] The District Court also sua sponte suggested that Gee had intentionally instigated the incident in order to challenge an adverse tenure decision that he knew was coming, but conceded that that was a "disputed" fact. App. B8 n.2. In fact, there was no competent evidence at all supporting that remarkable attribution of motive.

Gee's contentions on his First Amendment claims. First, the Court concluded that the fact that Gee's speech was made to his class in his role as a teacher actually *weighed against* any claim that his speech was on a matter of public concern. App. B7. Second, the District Court rejected Gee's claim that § 6C3-10.125, F.A.C., failed to give adequate notice that he would be punished for his speech because "it should have been obvious to Mr. Gee from . . . a reading of the rule" (App. B8) that his speech would be punished.

The District Court also rejected Gee's procedural due process claim because, under *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995), "a plaintiff cannot forego adequate state remedies for a federal procedural due process claim." App. B9. It also asserted that "Florida law provided Mr. Gee extensive procedural rights . . . including the right to eventual review in the Florida First District Court of Appeal," (*id.*), but cited no authority to support that proposition.

Finally, the District Court concluded that issues of fact remained with respect to Gee's Equal Protection claim. Because Gee wanted to immediately appeal the grant of summary judgment on his First Amendment and Due Process claims, he subsequently dismissed that claim in order to obtain a final judgment. Final judgment was entered on February 5, 1997. Gee timely appealed to the Eleventh Circuit, wherein he was supported by *amici* the American Association of University Professors and the American Civil Liberties Union Foundation of Florida.

The Eleventh Circuit affirmed the judgment of the District Court without opinion on April 3, 1998. App. A.

REASONS FOR GRANTING THE WRIT

This case presents two issues of importance over which the circuit courts have struggled mightily. The first is the protection under the First Amendment to be given expression by a university professor in the classroom, recognized by this Court as one of the hallmarks of academic freedom, *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987), and how that freedom should be weighed against a university's interest in controlling speech that occurs in its classrooms. This case presents a particularly apt case for clarifying those issues because it also starkly illustrates the extent to which application of modern "harassment" principles can lead to restraints on free speech, a question which has created much debate in the courts.[3]

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[3] *E.g.*, *DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir.) ("It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech"), *cert. denied*, 516 U.S. 974 (1995). The federal agency primarily responsible for enforcing the civil rights laws on college campuses has noted the serious First Amendment considerations that broadly applied "harassment" rules raise. *E.g.*, Department of Education Office of Civil Rights: Sexual Harassment Guidance, 62 Fed. Reg. 12032, 12045-46 (March 13, 1997) ("Title IX is intended to protect students from sex discrimination, not to regulate the content of speech").

Academics, too, have debated the line between free speech and harassment law. Eugene Volokh, *Freedom Of Speech And Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment And The First Amendment. No Collision In Sight*, 47 Rutgers L. Rev. 461 (1995); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 Rutgers L. Rev. 563 (1995); Kingsley R. Browne, *Workplace Censorship: A*

(continued...)

The second question revolves around when a state has deprived someone of liberty or property under *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986), and *Zinermon v. Burch*, 494 U.S. 113 (1990). The Eleventh Circuit has taken the broadest view of *Parratt*, far broader than any other circuit. Indeed, this case presents a striking example of how broad the interpretation is in the Eleventh Circuit. Gee followed every appeal available under Sec. 6C3-10.125, F.A.C. But because the courts below apparently discerned some additional (but unidentified) procedures, they concluded that the "state" had not yet deprived him of any property without due process.

A. This Court Should Grant The Petition To Resolve Important Questions Concerning First Amendment Protection For Professors At State Universities Over Which The Circuit Courts Have Split

In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), this Court made clear that a professor's lecture in his classroom was speech protected by the First Amendment, holding that the state had the ability to inquire into its content only where the inquiries were sufficiently related to an important state interest. *Id.* at 243-44, 249-50, 251-52. Although the Court has repeatedly emphasized the important role that teachers and academic freedom play in our society, it has not returned to the question of how much protection from state retribution the First Amend-

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[3](...continued)
Response To Professor Sangree, 47 Rutgers L. Rev. 579 (1995); Suzanne Sangree, *A Reply To Professors Volokh And Browne*, 47 Rutgers L. Rev. 595 (1995).

ment affords in-class speech.

That question includes several subsidiary issues over which the lower courts are split. First, how does the "public concern" test of *Connick v. Myers*, 461 U.S. 138 (1982) apply to a teacher's in-class speech? Second, should teachers have some "fair notice" of what speech is prohibited? Third, how should the respective interests of professor and university be balanced?

1. "Public Concern". -- In *Connick*, this Court held that the First Amendment protects the speech of "public employees" primarily when it relates to matters of "public concern." When it comes to pedagogic speech, though, this Court has never applied that requirement. In *Sweezy*, decided many years before *Connick*, the Court never identified the content of the professor's lecture. In *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), decided years after, the Court considered the First Amendment rights of *all government employees* speaking on a wide array of topics, including dance performances and other matters that would hardly be considered of "public concern" if the importance of the subject matter were the only criteria. *See also Nat'l Treasury Employees Union v. United States*, 990 F.2d 1271, 1273 (D.C. Cir. 1993) ("Viewing the idea of 'public concern' in the abstract, one might suppose it excluded some of the topics on which plaintiffs have spoken or written -- such as the technology of Civil War ironclads"), *aff'd in part, rev'd in part*, 513 U.S. 454 (1995).

The lower courts have been split on the application of the "public concern" test to pedagogic speech. The First Circuit applies a two-part test, neither leg of which is related to public concern. *Ward v. Hickey*, 996 F.2d 448,

452-53 (1st Cir. 1993) (state "may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern . . . ; and (2) the school provided the teacher notice of what conduct was prohibited"); *Silva v. University of New Hampshire*, 888 F. Supp. 293, 315 n.16 (D.N.H. 1994) (First Circuit does not apply "public concern" test).

Other circuits, while not explicitly eschewing the "public concern" test, have analyzed classroom or pedagogic speech without reference to it. *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991) (applying a balancing test to ninth grade teacher's comments about two students having had sexual intercourse on the school's tennis court; no discussion of "public concern"); *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989) (teacher's assignment of a grade to a student was a symbolic communication intended to send a specific message and was thus protected by the First Amendment; no discussion of "public concern"); *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985) (suspension of teacher for having used particular "life sciences" text violated that teacher's First Amendment rights; no discussion of "public concern"), *rev'd on other grounds*, *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986).

On the other hand, the Second and Fifth Circuits have applied the "public concern" test to classroom speech. *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994); *Martin v. Parrish*, 805 F.2d 583, 584 (5th Cir. 1986). And, of course, the courts below in this case applied the Eleventh Circuit's standard four-part test for public employee speech, the first part of which asks whether the speech meets the "public concern" test.

The usual "public concern" inquiry is problematic when dealing with pedagogic or classroom speech. Most importantly, this Court in *Connick* contrasted "public concern" with speech made "as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147. The lower courts have interpreted this holding as definitional, *i.e.*, as excluding from the "public concern" rubric only such "personal interest" speech. *See, e.g.*, *Burnham v. Ianni*, 119 F.3d 668, 679 (8th Cir. 1997) (en banc) ("public concern" speech "includes many types of speech, excluding mainly speech relating merely to internal office grievances"; teachers' communication of their interests in history met test); *Dishnow v. School Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996) (public concern is not limited to "matters of transcendent importance, such as the origins of the universe or the merits of constitutional monarchy; [it] mean[s] matters on which the public might be interested, as distinct from wholly personal grievances"; article discussing "sharing of household tasks by a working couple" is of public concern); *Nat'l Treasury Employees Union v. United States*, 990 F.2d 1271, 1273 (D.C. Cir. 1993) ("we read the 'public concern' criterion as referring not to the number of interested listeners or readers but to whether the expression relates to some issue of interest beyond the employee's bureaucratic niche"), *aff'd in part, rev'd in part*, 513 U.S. 454 (1995); *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) (blackface singing performance protected because "public concern" speech includes all speech "except that which, realistically viewed, is of purely 'personal concern' to the employee -- most typically, a private personnel grievance").

Pedagogic speech -- speech designed to communicate a message from professor to student -- transcends the

teacher's personal concern almost by definition. While it is part of professors' job responsibilities to so communicate, the communications are not *about* their jobs and are not matters of only *personal* concern. This case presents an opportunity for the Court to define the "public concern" test with greater clarity for the lower courts in an important context.

The Courts below found that Gee's speech was not a matter of public concern because it was "plain" that it was a "racially derogatory remark directed at students" in his class. Such analysis cannot withstand scrutiny, particularly on a motion for summary judgment, and ignores this Court's injunction that a determination of whether speech is of "public concern" requires consideration of the "content, form and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 148. The only thing "plain" about Gee's speech is that he tried to make an important point about individual initiative to his students. *See* Brief of Board Defendants to Eleventh Circuit Court of Appeals, p. 20 (Gee wanted to convey "the idea that some members of the community perceive African-Americans as lacking the motivation to seek out or create employment opportunities").[4]

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[4] The District Court cited two cases, *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) and *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995), for the proposition that there was no genuine issue of fact that Gee's speech was not on a matter of public concern. Each case, though, involved the use of profanity without any message at all. Martin conceded that his use of profanity was nothing more than an "expression of frustration with [his students'] progress" (*Martin*, 805 F.2d at 585). Coach Dambrot was urging his basketball players to play harder on the court. Both courts emphasized that individual context was decisive. *Id.* at 586 ("surroundings and context are essen-

(continued...)

2. Fair Notice. -- The lower courts rejected Gee's claim that FAMU had not given him fair notice that his speech could be considered racially harassing, concluding that a reading of the rule or common sense should have given Gee notice. This puts the Eleventh Circuit in conflict with other circuits, particularly the Ninth, which have held that racial or sexual "harassment" rules do not give "notice" that controversial classroom speech can be the subject of teacher discipline.

Of course, the notion that Gee's speech could be considered a form of "racial harassment" is absurd if those words are given the meaning that they are generally understood to encompass -- implicating objectively "severe" and "pervasive" conduct. *E.g.*, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (hostile environment requires "severe and pervasive" conduct, going beyond that which is merely "offensive," and must create a hostile environment both subjectively and objectively; "'mere utterance of an . . . epithet that engenders offensive feelings'" does not violate the law); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) ("'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not . . . violate Title VII" quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). The question, then, is to what extent academic freedom requires universities to give

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[4](...continued)
tial, case-by-case determinants of the constitutional protection accorded to indecent language"); *Dambrot v. Central Michigan University*, 839 F. Supp. 477, 489 (E.D. Mich. 1993) ("had [basketball coach] been doing *almost anything* with more intellectual content than encouraging basketball players with [use of the term "nigger"], he could persuasively argue that the matter [was of public concern]" (emphasis added)), *aff'd*, 55 F.3d 1177 (6th Cir. 1995).

reasonable notice that particular speech is prohibited.

This Court applied such a requirement more than thirty years ago in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). There, this Court examined a regulatory scheme imposed by New York statutes and rules designed to preclude the appointment or retention of "subversive" persons in state employment. It held that the ill-defined contours of that term rendered the regulatory scheme violative of the First Amendment. "When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone . . .'" *Id.* at 604.

In considering questions of discipline for in-class speech, the lower courts generally have applied this standard. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 970, 972 (9th Cir. 1996) (university violated First Amendment by punishing teacher for sexual harassment for his classroom speech, holding that "the [sexual harassment] Policy is simply too vague as applied to [professor] in this case"), *cert. denied*, 117 S. Ct. 1290 (1997); *Ward v. Hickey*, 996 F.2d 448, 452-53 (1st Cir. 1993) (punishment permissible for in-class speech only if "the school provided the teacher with notice of what conduct was prohibited"; a school "is not entitled to retaliate against speech that it never prohibited"). *Cf. Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1177, 1179 (3d Cir. 1990) (teacher adequately asserted due process claim where she alleged that ban on certain teaching technique failed to give her adequate notice of what was prohibited).

Although the District Court here purported to apply a "fair notice" requirement, its analysis, as affirmed by the Eleventh Circuit, creates a plain circuit split with the

Ninth Circuit's decision in *Cohen*. In *Cohen*, the Court considered a professor's *repeated* focus on topics of a sexual nature, and his use of profanities, vulgarities, pornography, and letters to *Hustler* magazine -- speech far more "severe" and "pervasive," and far more likely to be characterized as "harassing" under normal standards, than Gee's isolated, contextual expression of his views using one racially-tinged word. *See also, e.g.*, *Hosford v. School Committee of Sandwich*, 421 Mass. 708, 716, 659 N.E.2d 1178, 1182 (1996) (rule against the use of "profane or abusive language" did not give fair notice that teacher could be punished for leading discussion on use of certain words like "bitch" and "prick"); *Silva v. University of New Hampshire*, 888 F. Supp. 293, 312-13 (D.N.H. 1994) (punishment of teacher for having made sexual analogies and references in his English class violated First Amendment; "sexual harassment" policy, which precluded creating a "hostile environment," did not give adequate notice that such statements could be punished).

Given the prevalence of campus codes precluding the use of "harassing" speech, this Court should grant this petition to resolve the degree and extent to which those codes can be used to regulate "speech that d[oes] not fall within the core region of . . . harassment defined by [those codes]." *Cohen*, 92 F.3d at 972.

3. Balancing. -- The circuit courts in general have been split as to how to weigh the competing interests when in-class speech is involved. Several courts, rather than following the traditional balancing test for public employee speech under *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968), have relied upon the balancing test supplied by *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *See Ward v. Hickey*, 996 F.2d 448, 452-53 (1st

Cir. 1993) (applying *Kuhlmeier*); *Miles v. Denver Public Schools*, 944 F.2d 772, 777 (10th Cir. 1991) (rejecting *Pickering* test in favor of *Kuhlmeier*). The Courts below, of course, would have applied a four-part test which derives from the *Connick-Pickering* line of cases. *See also Blum v. Schlegel*, 18 F.3d 1005, 1011-12 (2d Cir. 1994) (applying *Pickering* test).

Moreover, regardless of the appropriate test, further guidance on balancing the competing interests of the university and the professor is needed. Unlike other workplaces, universities thrive on intellectual ferment and disagreement. *See Blum*, 18 F.3d at 1012 ("efficient provision of services by a State university's law school actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern"). If students, or other faculty members, have a "heckler's veto" over faculty speech, academic freedom will be greatly curtailed. Richard A. Hiers, *Academic Freedom In Public Colleges And Universities: O Say Does That Star-Spangled First Amendment Banner Yet Wave?*, 40 Wayne L. Rev. 1, 40 (1993) ("Persons with careers in academe know how little it takes to upset the delicate balance of competing egos and ideologies in academic departments"). Free speech will be shackled in the very place it should be most free.

B. This Court Should Grant The Petition To Resolve The Split Between The Circuit Courts Over Whether A Plaintiff Must Exhaust All State Judicial Remedies Before Bringing A Procedural Due Process Claim Under The Fourteenth Amendment

Relying on the Eleventh Circuit decision in

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1110 (1995), the lower courts in this case concluded that Gee had not exhausted all of his state remedies, and thus could not bring a claim for a violation of procedural due process under the Fourteenth Amendment. The holding in *McKinney v Pate* is at odds with most other circuits and established Supreme Court doctrine. This Court should grant the petition to resolve this conflict among the circuits.[5]

In *McKinney*, a public employee complained that the body that held a hearing before his termination was biased. The Eleventh Circuit held that even where a public employee is deprived of his property interest in continued employment without due process, the employee has no claim under the Constitution for a denial of procedural due process if there are additional state procedures, administrative or judicial, that can remedy the deprivation. *McKinney*, 20 F.3d at 1564 ("The Florida courts possess the power to remedy McKinney's loss both in terms of damages and equitable relief; as such, the Florida procedures satisfy procedural due process and alleviate any deprivation McKinney may have suffered at the hands of the Board"). In support of this conclusion, *McKinney* relied upon this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), which held that where a state employee

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[5] The District Court did not dispute that the procedures used by FAMU were inconsistent with due process. In the Eleventh Circuit, due process requirements include both fair procedures and a result which is supported by substantial evidence. *McKinney v. Pate*, 20 F.3d 1550, 1558 n.13 (11th Cir. 1994) (en banc). In cases involving the punishment of teachers at public schools or colleges, the minimum procedural steps include notice of the names of adverse witnesses and the nature of their testimony. *Martin v. Guillot*, 875 F.2d 839, 844 (11th Cir. 1989).

engages in a "random and unauthorized act" that deprives the plaintiff of his property in an unforeseeable way -- in that case the misplacement of a prisoner's hobby items by a prison guard -- it is impractical to require the state to provide predeprivation process, and the state therefore may satisfy its obligation to provide due process by merely providing a post-deprivation tort remedy. *Parratt*, 451 U.S. at 541.

Although *McKinney* itself involved only a claim that a hearing board was biased, the Eleventh Circuit has made plain in subsequent cases (including this one) that post-deprivation procedures must be used (1) regardless of why the initial procedures (or lack thereof) were inadequate and (2) regardless of whether the state actors were acting pursuant to an established state procedure, by authority granted to them, or otherwise. *Harris v. Bd. Of Ed. Of The City of Atlanta*, 105 F.3d 591, 596 (11th Cir. 1997) (superintendent's procedural due process claim against board of education, which relieved superintendent of duties without any hearing at all, would require consideration of whether Georgia provided adequate post-termination remedies; "district court must eventually address this question"); *Bell v. City of Demopolis*, 86 F.3d 191, 192 (11th Cir. 1996) (no procedural due process claim by police officer whose termination was reviewed by a special "police committee" and city council; inadequacy of either pre-termination or post-termination process could have been remedied by state judicial review); *Tinney v. Shores*, 77 F.3d 378, 382 (11th Cir. 1996) (no procedural due process claim against Sheriff and Deputy Sheriff who sold house-trailer pursuant to landlord's lien because plaintiffs did not plead inadequacy of post-sale procedures).

The Eleventh Circuit's interpretation of *Parratt*

conflicts with virtually every other circuit, most of which have held that *Parratt* is limited to cases where the conduct in question is truly "random" or "unauthorized." Indeed, a number of circuits have so held in contexts identical to the situation here. *E.g.*, *Moore v. Board of Education of Johnson City*, 134 F.3d 781, 785 (6th Cir. 1998) (rejecting district court's *Parratt*-based dismissal of due process claim, by teacher terminated after initial hearing, because teacher did not appeal case to state court; teacher "was required neither to plead nor prove the inadequacy of post-termination state law remedies in order to prevail"); *Loudermill v. Cleveland Bd. of Education*, 721 F.2d 550, 555 (6th Cir. 1983), *aff'd*, 470 U.S. 532 (1985); *Cotnoir v. University of Maine System*, 35 F.3d 6, 9, 12 (1st Cir. 1994) (professor's claim for procedural due process sustained even though he "waived his right to appeal to the Board of Trustees"; existence of additional state remedies was irrelevant because "the availability of post-termination grievance procedures will not ordinarily cure the violation"); *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 263 (1st Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988); *Charchenko v. City of Stillwater*, 47 F.3d 981, 984 (8th Cir. 1995) (terminated police officer who "did not pursue any administrative remedies in state court" could nonetheless assert due process claim in federal court); *Dwyer v. Regan*, 777 F.2d 825, 832 (2nd Cir. 1985) (civil service employee who could have, but did not, challenge termination pursuant to N.Y.C.P.L.R. Art. 78, could bring due process claim against New York State Comptroller who fired him; "where the depriving actions were taken by a high-ranking official having final authority over the decision-making process, . . . they were not random or unauthorized within the meaning of *Parratt*"); *Stana v. School Dist. of City of Pittsburgh*, 775 F.2d 122,

129 (3d Cir. 1985).[6]

Outside of the Eleventh, the Seventh Circuit has given the broadest definition to the "random and unauthorized" concept in *Parratt*. *Easter House v. Felder*, 910 F.2d 1387, 1400-05 (7th Cir. 1990) (en banc) (conspiracy among state agents to deprive private adoption agency of operating license "random" and "unauthorized" because in violation of state law), *cert. denied*, 498 U.S. 1067 (1991). (In so doing, one judge complained that the holdings of this Court were impossible to reconcile. *Id.* at 1408 (Easterbrook, J. concurring)). *See Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 460 (D.C. Cir. 1997) ("there is a circuit split on this issue" citing *Easter House*). Of course, even the Seventh Circuit

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[6] *See also, e.g.*, *Brooks v. George County*, 84 F.3d 157, 164 & n.6, 165 (5th Cir. 1996) (*Parratt* inapplicable to sheriffs' failure to pay pretrial detainee for work done on public property even though sheriff violated state law and plaintiff had the right to (but did not) seek payment before the county board of supervisors or in state court; "where employees are acting in accord with customary procedures, the 'random and unauthorized' element required for the application of [*Parratt*] is simply not met"), *cert. denied*, 117 S. Ct. 359 (1996); *Plumer v. Maryland*, 915 F.2d 927, 928-29 (4th Cir. 1991) (plaintiff could assert due process challenge to the revocation of her driver's license even though revocation allegedly violated state law and she could have "appeal[ed] the MVA's decision to the Circuit Court for Calvert County"); *Winters v. Board of County Commissioners*, 4 F.3d 848, 857 & n.12 (10th Cir. 1993) (pawn shop could assert due process challenge to sale of confiscated property even though Sheriff's Department violated state law and procedure was available for pawn shop to assert ownership rights under state law; "Available postdeprivation procedures are insufficient to neutralize a due process violation when the action is planned and authorized"), *cert. denied*, 511 U.S. 1031 (1994); *Haygood v. Younger*, 769 F.2d 1350, 1357 (9th Cir. 1985) (en banc) (*Parratt* applies in a "narrowly limited class of cases"), *cert. denied*, 478 U.S. 1020 (1986).

(unlike the Eleventh) recognizes that *Parratt* is inapplicable when actions are taken under an established state procedure. *Cushing v. City of Chicago*, 3 F.3d 1156, 1165 (7th Cir. 1993).

The other circuits all have relied upon this Court's decisions limiting *Parratt*. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435 (1982), for example, this Court found *Parratt* inapplicable where Illinois deprived plaintiff of a hearing on his employment discrimination claim after a commission for that purpose negligently failed to provide one within the 120 days required by the law. Although Illinois law provided a remedy for negligence by state actors, this Court held that *Parratt* did not require resort to that remedy because "it is the state system itself that destroys a complainant's property interest." *Zimmerman Brush*, 455 U.S. at 436.

Zinermon v. Burch, 494 U.S. 113 (1990) limited *Parratt* even further, by holding that a man who voluntarily admitted himself into a mental hospital could bring a procedural due process claim against mental hospital staff who admitted him without an adequate precommitment process -- even though the plaintiff also alleged that the confinement violated state law for such commitments (*Zinermon*, 494 U.S. at 123-24), and even though state law provided him with other remedies (*id.* at 130 n.15).

The *Zinermon* Court found *Parratt* distinguishable because plaintiff's confinement in the mental hospital was not a "random and unauthorized" act for which a pre-deprivation hearing was impractical, but rather was pursuant to an "established state procedure"; that is, "[t]he State ha[d] delegated to [the defendants] the power and authority to effect the very deprivation complained of." *Id.* at 138.

Zinermon held that the *Parratt* was a "special case" in due process analysis where "postdeprivation tort remedies are all that is due, simply because they are the only remedies the State could be expected to provide." *Zinermon*, 494 U.S. at 128.[7]

The Eleventh Circuit's broad interpretation of *Parratt* is at odds with these precedents. Here, Gee was not suspended pursuant to any "random or unauthorized" acts. Rather, defendants acted pursuant to Section 6C3-10.125, F.A.C., and by the authority invested in them as administrators of FAMU.[8] Defendants are perfectly analogous to the hospital workers in *Zinermon*, in whom au-

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[7] Although not directly addressing *Parratt*, this Court's decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) also strongly militates against the Eleventh Circuit's rule. *Loudermill* involved the claim of a state employee, terminated based upon an accusation of lying on his employment application, who claimed that his pretermination hearing failed to meet minimum requirements. This Court upheld that claim, even though the employment decision was "subject to judicial review in the state courts" and the employee failed to seek such review. This Court also rejected the employee's claim that the posttermination administrative proceedings violated due process (*Loudermill*, 470 U.S. at 547); this, however, did not affect the viability of the claim that the initial hearing violated due process because they were "separate claim[s] altogether." Id. at 547 n.12. This holding cannot be reconciled with the Eleventh Circuit's view that a violation of procedural due process is not "complete" until a plaintiff has availed himself of all the remedies provided by the state. *E.g.*, *Stana v. School Dist. of City of Pittsburgh*, 775 F.2d 122, 129 (3d Cir. 1985) (so interpreting *Loudermill*).

[8] The procedures in Section 6C3-10.125, for example, were deficient in that they provide for notice of allegations, and the reasons for punishment, but no notice of the evidence that was relied upon by FAMU. *See* § 6C3-10.125(5)(d), (e), F.A.C. (App. D11-D12).

thority, however exercised, was invested by the state.[9]

Of course, states have constitutions and most of them have provisions similar to the Fourteenth Amendment's due process clause (*e.g.*, Fla. Const. art. I, § 9). If taken to its logical conclusion, the Eleventh Circuit's application of *Parratt* would mean that all deprivations of property or liberty without due process would *have* to be brought in state court, under a state constitutional provision. So, too, because of principles of *res judicata* (*viz.*, merger and bar), any claim arising out of the same facts (like Gee's First Amendment claim) would have to be brought in state court. *Loudermill v. Cleveland Bd. of Education*, 721 F.2d 550, 555 (6th Cir. 1983) ("if there were . . . a requirement [of exhaustion], then principles of

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[9] The application of the Eleventh Circuit's expansive reading of *Parratt* is particularly harsh here. Gee took each appeal of which FAMU advised him and that are set forth in Sec. 6C3-10.125. Although the District Court referred to other state remedies, it never truly identified them. At the outset of its due process discussion, the District Court noted that Gee had "initially appeal[ed] his suspension [sic] to the Board of Regents," but did not do so when FAMU reimposed the suspension. App. B8. Actually, Gee filed a grievance under his collective bargaining agreement when President Humphries decided not to renew his contract in November 1993, and that grievance eventually reached a designee of the Board. That option was unavailable after the matter was remanded to Ms. Gavin for an investigation and recommendation. R.169-Att., Ex. T, CBA ¶ 20.2 ("the President's response to a recommendation of a hearing officer or other individual or group having appropriate jurisdiction in any other procedure shall not be an act or omission giving rise to a grievance" (emphasis added). So, too, despite the Court's reference to "eventual review in the Florida District Court of Appeal" App. B9, neither the Courts below nor defendants ever cited one instance of a decision under Sec. 6C3-10.125 ever being reviewed in a Florida court. *See also* Sec. 6C3-10.125(8)(b) (App. D15) (if administrative appeal is taken, "doctrine of election of remedies" applies).

res judicata and collateral estoppel would bar almost all access to federal courts in Sec. 1983 actions, a result plainly at odds with congressional intent"), *aff'd*, 470 U.S. 532 (1987). Perhaps that is what this Court intended in *Parratt*; if so, though, a more explicit statement would better guide the lower courts.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

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APPENDICES

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B Order And Opinion Of The United States District Court For The Northern District Of Florida (December 3, 1996) B1

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3 42 U.S.C. § 1983 . . . . . D2

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